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CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 580

BAUER, POGUE & CO. INC., and FREDERICK R. BAUER,

Petitioners,

vs.

ADELE D. TROUNSTINE, as Ancillary Executrix of the Last Will and Testament of Norman S. Goldberger, Deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

STATEMENT

Plaintiffs apply for certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which unanimously affirmed without costs to either party a final decree of the District Court of the United States for the Southern District of New York awarding respondent a judgment of $101,707.05 (R. 352-4, 455).

The Trial Judge (Bright, *D. J.*) delivered four opinions which will be found at pages 296, 334, 343 and 349 of the Record. The opinion of the Circuit Court of Appeals will be found at page 435 of the Record and is reported in 144 F. 2d 379.

NATURE OF ACTION

Plaintiff, the ancillary executrix in New York of the Last Will and Testament of Norman S. Goldberger, deceased, brought suit for an equitable accounting (R. 209), and the defendant corporation in its answer also prayed an accounting of the transactions between the decedent and the corporation (Par. 21, Answer, R. 215, 216). Under the construction advanced by its counsel it would have judgment for some $52,000 (R. 384).

SUMMARY OF FACTS

The facts are so well set forth in the opinions of the learned Trial Judge and in that of the Circuit Court of Appeals that we shall not here restate them. It was found by the courts below that the agreement and trading account were obviously a joint adventure (R. 306, 344). It was for the breach of the obligations attending the joint adventure that the courts below fastened liability upon the defendants* (R. 306, 310, 311).

The evidence disclosed that during the maintenance of the joint account between defendants and plaintiff's testator and the distribution of the stock which was contributed to the joint account by both parties, the defendant corporation made clandestine sales of quantities of Fidelio stock for its own benefit from an account of its own referred to through the Record as the "trading account" (R. 297, 303, 306). The evidence disclosed that the defendant corporation made sales of Fidelio stock also from accounts in the names of Duffy, Valenti and Williams who

*The transactions took place prior to the effective date of the Securities Act of 1933 (48 Stat. 75, Title 15 U. S. C. A. Sec. 77c (a)(1)).

were employees of the defendant corporation and admittedly mere dummies, the proceeds of such sales being encashed and divided between the individual defendants (R. 306) and not disclosed to or accounted for to the decedent; it appeared moreover that the 50,000 shares of Fidelio stock contributed by the decedent to the venture were, as found by the learned Trial Judge in his opinion (R. 306), registered not in the name of the defendant corporation but in that of the partnership of Bauer, Pogue & Company in which the individual defendants were copartners. This would seem to be sufficient answer to the claim that defendant Bauer was innocent of wrongdoing and was without knowledge of the terms of the obligations assumed by the defendant corporation, and is proof moreover of the breach of those obligations. The Trial Court found and there is ample evidence that the defendants Bauer and Pogue were copartners "and so continued until the death of Pogue" (R. 297). Bauer's testimony that he had naught to do with the operations of Bauer Pogue's office is belied by the failure to deny the allegations to that effect in the complaint (R. 195), such allegations infact having been expressly admitted in Bauer's answer (R. 217). The Record does not support the statement in the petition, page 3, that the entries in defendants' books were made "by a former employee who had been imprisoned for embezzlement and falsification of its books"; much less does the Record support the statement in the petition, page 8, that in this case "records of the corporate defendant were changed by a dishonest employee who was thereafter imprisoned". *There is no such evidence anywhere in the Record,* and it is noteworthy that the petition fails to cite the place in the Record supporting the statement, as required by the Court rule. In fact, the Record

discloses that five different persons including the persons in whose names the secret dummy accounts were maintained made entries in the books (R. 121-2, 201, 270-1), and there was some doubt as to the author of various of the entries in defendants' books (R. 386), all of which, however, were made contemporaneously with the transactions therein reported (R. 115, 116) which did not come to light until some six years after the entries were made and three years after the death of the decedent.

In spite of the suggestion that the recovery was predicated upon false entries in the defendant corporation's books, the Record is barren of any evidence to substantiate the suggestion, and it is significant that not a single material error in the books was pointed out at the trial or before the Special Master. The notice of appeal and the statement of the defendants'-appellants' points in the Circuit Court below brought up for review no issue in respect of the accounting itself.

The statement in the petition (bottom page 2) "The written agreement of June 9, 1933 alleged in the amended complaint was never executed by all the parties", is only speciously accurate. The account formed by the agreement (R. 102) after its execution by the decedent and the defendant corporation, was joined by Tribble, the other party named in the agreement of June 9, 1933, by a formal writing about a month later (Pltff's Trial Exh. 2, R. 3; Pltff's Trial Exh. 19, R. 31; Pltff's Trial Exh. 18, R. 32) and he was treated thereafter as a member of the joint account (R. 373, Pltff's Trial Exh. 4, R. 18; Pltff's Trial Exh. 5, R. 19; Pltff's Trial Exh. 18, R. 30). Upon the trial, all of the evidence offered in behalf of plaintiff, except for two witnesses whose function was to identify signatures, consisted of documentary proof.

POINT ONE

THE COURTS BELOW PROPERLY INTERPRETED AND APPLIED RULE 43(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. Under None of the Precepts Set Out in Rule 43(a) Was Bauer's Testimony Admissible, and Bauer Was Incompetent to Testify to his Transactions with the Decedent.

Rule 43(a) deals only with the matter of the admission of testimony and has nothing to do with the exclusion of testimony. cf. Green, The Admissibility of Evidence under the Federal Rules, 55 Harvard Law Review, 197, p. 203; *U. S.* v. *Aluminum Company of America,* 1 Federal Rules Decisions, 1.

Whether or not Rule 43(a) "supplanted" or "displaced" the Competency of Witnesses Act as suggested by Dean Wigmore* (Volume 1, Wigmore on Evidence, 3rd Edition, page 199) the application of all of the precepts set out in the Rule bars the testimony and disqualifies the witness. Petitioners in quoting Dean Wigmore's treatise failed to quote the whole of the paragraph, subdivision (B) of Section 6c C which is to be found at page 200 of the treatise. The full paragraph reads:—

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*Professor Moore appears to think otherwise (Moore's Federal Practice, Volume 3, page 3067) and Professor Green cannot be said to accord with Wigmore (Green, The Admissibility of Evidence Under the Federal Rules, 55 Harvard Law Review, 197, 203.) There is ample evidence of lack of intention in the Advisory Committee to "supplant" or "displace" the Competency of Witnesses Act (see note to Rule 44 in Advisory Committee Report, April, 1937, stating that the Competency of Witnesses Act is *"in effect continued"*; note to Rule 43(a) "the last sentence modifies *to the extent indicated* U. S. C. A. Title 28, Sec. 631 (Competency of Witnesses governed by State Laws").) (Italics ours)

"(B) *Does Rule 43 supplant and displace the numerous judicial decisions interpreting the above four Acts?* Since it appears from the foregoing comments that the Mode of Proof Act and the Conformity Act are no longer applicable, that the Rules of Decision Act is expressly understood to be displaced, and that the Competency of Witnesses Act is by implication displaced, it may be inferred that the prior judicial decisions interpreting them are no longer *binding*. 'For this relief, much thanks!'

Nevertheless, they may still be looked to as guiding where their words are identical with the new Rule; and thus their ghosts may haunt the Bar."

(The limited effect of the new Federal Rules upon the rules of evidence prevailing at the time of the adoption of the Rules was recognized by the members of the Advisory Committee (see Proceedings of the Institute at Washington, D. C. October 6th, 7th, 8th, 1938 and of the Symposium at New York City October 17th, 18th, 19th, 1938, published by American Bar Association, pages 229, 277, 278, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21st, 22nd, 23rd, 1938, published by American Bar Association, page 186).)

Although not upon the precise point here involved, the construction and effect of Rule 43(a) was before this court in—

National Battery Co. v. *Levy* (C. C. A. 8, 1942) 126 F. 2d 33, 36, cert. den. 316 U. S. 697.

The proffered testimony was not admissible:

(a) "Under the statutes of the United States".

No federal statute exists affirmatively making Bauer's testimony admissible. Professor Moore notes that in re-

spect of the admission of evidence there exist federal statutes prescribing only how proof of public records may be made (Moore's Federal Practice, Volume 3, page 3065). The only other applicable federal statute is the Competency of Witnesses Act (Title 28 U. S. C. A. § 631, R. S. § 858) which tests Bauer's competence as a witness by the laws of the State of New York, and under the applicable New York statute Bauer was incompetent to testify to his transactions with the decedent.

Section 347 Civil Practice Act;
Griswold v. *Hart,* 205 N. Y. 384, 395;
Matter of Siegle, 289 N. Y. 300;
Rogers v. *Rogers,* 153 N. Y. 343;
Matter of Callister, 153 N. Y. 294.

(b) "Under the rules of evidence applied in Courts of the United States on the hearing of suits in equity".

In the equity practice prevailing in the federal courts held in New York prior to the promulgation of Rule 43(a), the "dead man's statute", Section 347 of the Civil Practice Act (formerly Section 829 of the Code of Civil Procedure) was applicable, testimony of the character involved barred as evidence and the witness held incompetent to testify to transactions with the decedent.

Baldwin v. *R. S. Howard Co.* (C. C. A. 2, 1916), 233 F. 439; affd. 238 F. 154; cert. den. 243 U. S. 636 (Infringement of trade mark and injunctive relief);
Updike v. *Mace* (D. C. N. Y., 1912), 194 F. 1001 (To impress trust);

Rowland v. *Blesecker* (C. C. A. 2, 1911), 181 F. 128; affd. 185 F. 515 (Patent infringement);

Harris v. *Morse* (C. C. A. 2, 1931), 54 F. 2d 109 (To impress trust);

Metropolitan Life Insurance Company v. *Dunne* (D. C. 1931, N. Y.), 2 F. Supp. 165 (Interpleader);

Metropolitan Life Insurance Company v. *English* (D. C. 1923, N. Y.), 291 F. 577;

N. Y. Life Insurance Company v. *Cross* (D. C. 1934, N. Y.), 7 F. Supp. 130 (Interpleader).

Since the equity system of evidence adopted the maxim ***"aequitas sequitur legem"***, the law of evidence in courts of equity was identical with the law of evidence in courts of common law.

Harmer v. *Gwynne,* 11 F. Cas. 551, No. 6075 (C. C. Ohio 1851);

Wood v. *Strickland,* 2 Meriv. 461, 464 (Ch. 1817);

Manning v. *Lechmere,* 1 Atk. 453 (Ch. 1737);

Green, Admissibility of Evidence Under the Federal Rules, 55 Harvard Law Review, p. 201, 202;

Callahan & Ferguson, Evidence and the New Federal Rules of Civil Procedure, 45 Yale Law Journal, 622, 625; 47 Yale Law Journal, 194, 197, 198.

The Competency of Witnesses Act applies "in any civil action, suit of proceeding in the courts of the United States":

1 Wigmore on Evidence, 3rd Edition, Section 6, page 171;
cf. Moore's Federal Practice Under the New Federal Rules, Volume 3, page 3065;
Callahan & Ferguson, 45 Yale Law Journal, 622, 624,

and the so-called "dead man's statute" of the District of Columbia expressly held applicable by this court to the Circuit and District Courts of the United States as well as to the Court of the District of Columbia.

Page v. *Burnstine,* 102 U. S. 664 (1881). (Action to impress a trust and for accounting).

The true interpretation of Rule 43(a) may be found in Moore's Federal Practice, Volume 3, page 3067, as follows:—

> "The last sentence of Rule 43(a) applies the same test to matters of competency of witnesses as to admissibility of evidence, but since the Competency of Witnesses Act heretofore in force, was applicable to suits in equity as well as actions at law, the law of the state in which the federal court is sitting in the criterion of competency under any of the alternatives of Rule 43(a). The new form of stating the rule does have an advantage, however, in that it makes it clear that any federal competency statutes which may subsequently be adopted will control over the state law without conflicting with the rule."

To the same effect—

Callahan & Ferguson, Evidence and the New Federal Rules of Civil Procedure, 47 Yale Law Journal, 194, 198.

(c) "Under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held".

The bar of the New York statute is directed not so much to the admissibility of the testimony as such but to the competence of the witness to testify.

Hoag v. *Wright,* 174 N. Y. 36;
Russell v. *Hitchcock,* 105 App. Div. 315.

The Federal Courts in construing statutes bearing upon the competency of witnesses, are to be guided by the construction placed upon them by the highest courts of the state.

McBride v. *Kirkpatrick,* 207 F. 893 (D. W. Va. 1913); affd. 232 F. 859 (C. C. A. 4, 1916);

Central Iron & Coal Co. v. *Hamacher,* 284 F. 50 (C. C. A. 5, 1918);

cf. Rankin v. *Cox,* 71 F. 256 (C. C. A. 8, 1934);

Callahan & Ferguson, Evidence and the New Federal Rules of Civil Procedure, 45 Yale L. J. 622, 631;

Montgomery's Manual of Federal Jurisdiction and Procedure, 4th Edition, Section 629, page 404.

Bauer was incompetent to testify and his testimony was inadmissible under Section 347 of the Civil Practice Act in conformity with the construction placed upon the statute by the New York Court of Appeals.

Griswold v. *Hart, supra;*
Matter of Siegle, supra;
Rogers v. *Rogers, supra;*
Matter of Callister, supra.

B. No Conflict Exists Among the Circuit Courts in the Interpretation or Application of Rule 43(a) So Far As Concerns the Competency of Witnesses Act or the "Dead Man's Statutes" of the Several States.

The Circuit Courts in applying Rule 43(a) have been unanimous in recognizing the binding effect of the so-called "dead man's statutes" of the several states, and no difference of opinion among the Federal Courts has been found.

Dovel v. *Sloss-Sheffield Coal Co.,** C. C. A. 5, Alabama (1943), 139 F. 2d 36, 37; cert. den. 64 S. Ct. 1057, 88 L. Ed. 902; Docket No. 842, October, 1943 Term;

Duckett v. *Duckett,* C. C. A. D. C. (1943), 134 F. 2d 527, 528;

Rehm v. *Interstate Motor Freight System,* C. C. A. 6, Michigan (1943), 133 F. 2d 154, 158;

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*The petitioner for the writ of certiorari contended in this court that the excluded evidence was *admissible* under the Alabama "dead man's statute" and the decisions of Alabama construing it, the respondent contending that the evidence was properly excluded upon other grounds. (The Circuit Court's opinion said the witness was "disqualified" (p. 37)).

Dellefield v. *Blockdell,** C. C. A. 2, N. Y. (1942), 128 F. 2d 85, 93;

Shultz v. *Manufacturers & Traders Trust Company,* C. C. A. 2 N. Y. (1942), 128 F. 2d 889, 893; cert. den. 317 U. S. 674;

Robins v. *Pitcairn,* C. C. A. 7, Illinois (1941), 124 F. 2d 734, 737;

Burdick v. *Powell Bros. Truck Lines,* C. C. A. 7, Illinois (1941), 124 F. 2d 694, 697;

Kentucky West Virginia Gas Co. v. *Woods,* C. C. A. 6, Kentucky (1940), 110 F. 2d 94. 96;

Carter Oil Co. v. *Welker,* C. C. A. 7, Illinois (1939), 24 F. Supp. 753, 758; affd. 112 F. 2d 299; reversed 317 U. S. 592;

Lucas v. *Hamilton Realty Corp.,* C. C. A. D. C. (1939), 105 F. 2d 800, 802, 804;

Metropolitan Life Insurance Co. v. *Gosney,* C. C. A. 8, Missouri (1939), 101 F. 2d 167, 171;

Peoples Trust & Savings Bank v. *Hubbell,* C. C. A. 10, Kansas (1939), 102 F. 2d 754, 756;

Cleveland Clinic Foundation v. *Humphrey,* C. C. A. 6, Ohio (1938), 97 F. 2d 849, 859, cert. den. 305 U. S. 628.

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*It is noteworthy that Judge Clark who wrote the opinion in the Dellefield case was a member and the reporter of the Advisory Committee on Rules for Civil Procedure appointed by this court, and that the learned Judge was a member of the Bench which joined in the decision presently sought to be reviewed.

POINT TWO

BAUER'S TESTIMONY WAS INADMISSIBLE UNDER THE PAROL EVIDENCE RULE AND THEREFORE PROPERLY EXCLUDED.

The record discloses (R. 239-244, 245-257, 264, 266) that Bauer was attempting to testify to an oral modification of the letter agreement of June 9th, 1933 which modification was alleged to have been entered into prior to the return of the agreement to him by the decedent. This evidence was barred under the Parol Evidence Rule of the forum state.

> *Mitchell* v. *Lath,* 247 N. Y. 377;
> *Hendricks* v. *Clements,* 195 App. Div. 144, 149;
> Restatement of Contracts, Section 237;
> 3 Williston on Contracts (Rev. Ed.) pp. 1835, et seq.

The vice of admitting such testimony was clearly recognized by the trial court (final opinion of Bright, *D. J.*—R. 344, 345).

If the conversation took place after the delivery of the agreement to Bauer, it would have been nothing more or less than a new agreement waiving the provisions of the contract. One thing is definite because Bauer himself so testified—the conversation did not take place at the time the agreement was delivered to him (R. 243).

The Parol Evidence Rule is part of the substantive law of the several states;

> *Zell* v. *American Seating Co.,* 138 F. 2d 641, 643, C. C. A. 2 (1943), reversed, Docket No. 613, October Term, 1943, 88 L. Ed. 900;

Pitcairn v. *Philip Hiss Co.*, C. C. A. 3, 125 F. 110, 113; *American Sugar Co.* v. *Nicholas*, C. C. A. 10, 124 F. 2d 477, 479,

and the Parol Evidence Rule remains unaffected in anywise by the new Rules of Federal Procedure because in the Enabling Act (Title 28 U. S. C. A., Section 723-b, 48 Stat. 1064), it was stated "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant".

cf. Ruhlin v. *New York Life Insurance Co.*, 304 U. S. 202;
Erie Railroad Company v. *Tompkins*, 304 U. S. 64.

It will be seen therefore that the evidence attempted to be given by the witness Bauer offended not only against Section 347 of the Civil Practice Act under which Bauer was incompetent to testify, but also against the Parol Evidence Rule. At the trial it was attempted, through the medium of the alleged oral conversation between Bauer and decedent in effect to cancel and nullify the solemn written agreement made by the parties under which the parties acted (R. 3, 4, Pltff's Trial Exh. 21, R. 32-34, Pltff's Trial Exh. 13, R. 281, Plaintiff's Trial Exhibit 14, R. 29). The record discloses that the written agreement of June 9, 1933 was retained without protest by defendants, and it was not until after the commencement of the action that any claim was made of what amounts to an oral modification.

POINT THREE

THE LENOX CLOTHES SHOPS CASE HAS NO APPLICATION WHATEVER TO THE CASE AT BAR, AND THE RECORD DOES NOT SUBSTANTIATE THE STATEMENT ATTRIBUTED TO PLAINTIFF'S COUNSEL APPEARING IN THE HEADING OF POINT THREE OF PETITIONERS' BRIEF.

Petitioners rest heavily upon the authority of *Lenox Clothes Shops, Inc.*, v. *Commissioner of Internal Revenue*, 139 F. 2d 56, in which the court held that the Commissioner of Internal Revenue must observe admissions and stipulations of his counsel of record during the trial of the case. It is argued by petitioners (pages 24-5 of petitioners' brief) that plaintiff's counsel have taken the position that there was no oral agreement and that such contention was in conflict with the finding by the Trial Court to the effect that an oral agreement had been reached for the conduct of the joint adventure in respect of which the defendants were required to account. The position of plaintiff's counsel was stated at the trial as follows (R. 376):—

> "Mr. Bernheimer: What I propose to do at this moment is to offer to the Court a number of items of written evidence, exhibits, and that is all I propose to do because I believe that those exhibits, both in themselves and by necessary implication of law, necessary imperative rulings of law, place upon the defendants here the duty of accounting for all of this stock from June 8th, including the trading account stock and the stock in the names of the nominees. So far as there is or may be a hiatus between June 8th and June 9th, June 9th the agreed date of the agreement here, it is common practice that in interpreting these things parties start perhaps a day or

two before, and it is imperative law that the acts and construction of the parties themselves shall rule and have the greatest force, and that nothing can have greater force in the construction of a contract than the construction which the parties themselves put upon it, and then there is the law, which is well established, that nobody, no fiduciary or agent could obtain a benefit to himself * * *".

And later (R. 376):

"Counsel has stated that plaintiff is trying to write a new contract. We are not, if your Honor please. We are not trying to write a new contract. *We stand, as I said earlier in the trial, on the contract expressed in the letter dated June 9th which is Plaintiff's Exhibit 1 here, and upon that letter and upon the construction of the parties, and upon the necessary inference of fact and the necessary implications of law.*" (Italics ours)

And later (R. 377):

"It is common experience in business as well as courts, legal experience as well as court experience, that parties do not always, or not invariably, execute contracts and perform them to the minutia in the same way that they are written, and so the courts, by necessity and by wisdom have, because courts have at least the same wisdom as practical people have, raised the rule, the necessary rule, that the practical construction of the parties is the surest evidence of what they intended to do or what they did."

At R. 378:

"The Court: On your rule of practical construction that is usually a practical construction of a

written contract. Are you standing solely on this writing?

Mr. Bernheimer: We stand solely on the writing, sir, as I have said, *with the implications of law and inferences from facts, and as shown by the constructions and actions of the parties.* (Italics ours)

The Court: If that is so, you are standing solely on your second cause of action.

Mr. Bernheimer: *With the limitation that I have just expressed.* I cannot express it any better.

So far as direct varying, other than or different from that of June 9th, is shown and evidenced by what the parties did, beginning actually on June 8th and by settling as to June 8th, if that requires the inclusion of the first cause of action, we shall include it." (Italics ours)

The Finding of Fact (R. 309) made by the Trial Judge states that the parties "entered into a joint venture and agreement which was confirmed in writing on June 9th, 1933 in substantially the terms and conditions set forth in Exhibit B attached to the amended complaint". The situation was well considered by the Circuit Court which in its opinion (R. 437) declared:—

> "It is true that no direct testimony was offered to prove the making of an oral agreement of that date * * *. Concededly, however, the parties did at some time agree, and the inference that their agreement should take effect as of some earlier date is entirely reasonable; indeed, no other, we think, would be supportable under the evidence."

It should be noted that the joint account letter agreement bears date June 9, 1933 (R. 276, 280). As the Trial Judge indicated in his opinion (R. 304) the finding that the

joint account had its inception on June 8, 1933 is based upon the fact that the defendants' own ledger shows that the parties actually were operating the joint account on June 8, 1933 (Pltff's Trial Exh. 3, R. 5) and that defendants had rendered a voluntary accounting including these same June 8th transactions therein (Pltff's Trial Exh. 3, R. 5, Pltff's Trial Exh. 22, R. 51, 52, 70, 72-3, 89).

Thus, the practical construction placed upon the agreement by the parties, the acts which they did and the entries which they made in their books, are entitled to almost conclusive effect as demonstrating the intent of the parties and the construction placed by themselves upon the contract.

Brooklyn Life Ins. Co. v. *Dutcher,* 95 U. S. 269, 273;
Topliff v. *Topliff,* 122 U. S. 121, 131;
Zimmerman v. *Roessler & Hasslacher Chemical Co.,* 246 App. Div. 306, 315.

In considering the findings of the lower court, this court will not review the weight of the evidence but "so far as there is any testimony consistent with the findings, it (the testimony) must be treated as unassailable" (*Adamson* v. *Gilliland,* 242 U. S. 350). Findings supported by "substantial" or "ample" evidence will not be disturbed (*Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251; *Mechanics Universal Joint Co.* v. *Culhane,* 299 U. S. 51).

It is apparent that the so-called admissions of plaintiff's counsel were at most arguments of legal doctrine which in any case must yield to the court's findings upon the evidence submitted to it.

POINT FOUR.

THE DEFENDANT BAUER WAS PROPERLY HELD PERSONALLY LIABLE.

The defendant Bauer admittedly was President, a director and the owner of half the stock of the defendant corporation (R. 194, 217). He admitted that he had received his half of the proceeds from the sale of shares in the names of the dummies, which shares were owned in part personally by him, and that during the management of the joint account he and his partner Pogue were engaged in the direction and management of the defendant corporation (Pars. 7-9 Amended Complaint, R. 194; Pars. 1-2 Bauer's Answer, R. 217; Par. 37 Amended Complaint, R. 201-2; Par. 12 Bauer's Answer, R. 219). Bauer profited from the distribution of the assets of the defendant corporation created in part from the violation of the joint account agreement, and he was a party to the violation (R. 308). As stated, the decedent's contribution to the joint venture of 50,000 shares of Fidelio stock was registered in the name of the copartnership consisting of Bauer and Pogue (R. 306). Under the circumstances, there seems to be not the slightest doubt that Bauer was properly held personally liable for the amount of plaintiff's recovery.

McIntyre v. *Kavanaugh,* 242 U. S. 138, 193; aff'g. 210 N. Y. 175.
Wechsler v. *Bowman,* 285 N. Y. 284, 291;
Wainwright & Page v. *Burr McAuley,* 272 N. Y. 130;
Mack v. *Latta,* 178 N. Y. 525;
Muller v. *Ackerman,* 250 App. Div. 129;

Bauer was not only President and a director of the defendant corporation but a member of the partnership of Bauer, Pogue & Company which participated in the clandestine operations found by the Trial Court to have been a fraud against plaintiff's testator, and Bauer also had access to the books and records of the corporate defendant wherein entries of the corporation's transactions were made by its bookkeepers, and Bauer was presumed to know the contents thereof.

Fairchild v. *Fairchild,* 64 N. Y. 471, 480;
Hotopp v. *Huber,* 160 N. Y. 524, 530;
Flour City Nat. Bank v. *Widener,* 163 N. Y. 276, 279.

POINT FIVE.

THE DECISIONS BELOW PERMITTING THE CONTINUANCE OF THE INSTANT SUIT AGAINST THE PETITIONER CORPORATION DO NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE HIGHEST COURT OF THE FORUM STATE OR OF A FEDERAL COURT OF SIMILAR APPELLATE JURISDICTION.

Bauer, Pogue & Co. Inc. was incorporated in Delaware in April of 1933 (R. 194). It thereupon qualified to do business in New York (R. 194-5) designating the Secretary of State of New York as its agent for the service of process within the State (General Corporation Law, Sec. 210). On December 16, 1937 the corporation was voluntarily dissolved in Delaware (R. 194). This action was commenced June 8, 1939 (R. 175).

Under Delaware Law actions *by* corporations commenced within three years following their dissolution may be prosecuted until final termination and execution (Re-

vised Code of Dela., 1935, Sec. 2074, Appendix A, p. 30, hereof). Under the Delaware Law as it existed in 1937 and up to April 9, 1941, actions commenced *against* corporations within three years after their dissolution could be prosecuted up to the expiration of such three year period following which a Receiver might be appointed and substituted for the corporation (ibid). By act of the Delaware Legislature effective April 9, 1941, the statute was amended to permit suits against dissolved corporations commenced within the three year period following dissolution to be continued until final decree or judgment and execution (Laws of Dela., 1941, Chap. 132, Sec. 11). This action was tried in December of 1941 (R. 228).

Upon its dissolution in 1937 the corporate defendant in conformity with Section 216 of the General Corporation Law filed a certificate of surrender of its authority to do business in New York pursuant to which it designated the Secretary of State of New York thereafter to receive service of process in any action based upon an obligation of the corporation theretofore incurred in the State of New York (Appendix B, p. 31, hereof). This action was commenced by the service of process upon the Secretary of State pursuant to such designation.

The amended complaint alleges that the corporation was dissolved in December 1937 and

> "that under the Laws of the State of Delaware, said defendant corporation continues in existence for the purpose of liquidating its assets, discharging its liabilities and prosecuting or defending suits by or against it" (R. 194).

In their answers appellants specifically admit such allegations of the amended complaint (R. 211, 217). At no time

were either of the answers amended nor was there ever any motion for abatement of the action or the substitution of the directors of the corporation as trustees. A motion by plaintiff for the appointment of a receiver because of the impending expiration of the three year period was specifically opposed by defendants resulting in the denial of the appointment of a Receiver, although the corporate defendant *consented* to an order restraining it from distributing its assets then in its possession (R. 361).

At the trial no suggestion was made upon the record that the corporate defendant was not legally able to defend on the merits and it actually appeared by counsel and offered proof as to the merits (R. 228). It sought affirmative relief in its answer (Par. 21, R. 215, Prayer for Relief R. 216). Its counsel appeared separately from counsel for the defendant Bauer and its counsel undertook the entire burden of the defense, Bauer's counsel only occasionally joining in with an objection. Since the judgment its counsel has been substituted as counsel for both parties upon the appeal.

A.

Under Delaware law a dissolved corporation is not irrevocably dead. Since 1927 it may be revived at any time upon complying with certain general requirements of Delaware.

> Dela. Revised Code 1935, Sections 2078, 2106, 2107, 2109.

Having such spark of life remaining in it, the amendment of the Delaware law in 1941 applies to actions pending

against corporations which had been dissolved more than three years prior thereto.

Wax v. *Riverview Cemetery Co.*, 24 A. 2d 431 (Delaware).

In that case a corporation was dissolved for non-payment of franchise taxes in 1924. At that time the statute provided for reinstatement only within two years upon paying arrears and complying with other formalities. In 1927, more than two years after the corporation's dissolution, the statute was amended to provide for reinstatement of dissolved corporations generally at any time. The Superior Court of Delaware held that the statute being remedial, it applied to the dissolved corporation; that so long as a corporation can be reinstated, it is not completely dead and that accordingly it had sufficient existence to be defendant in an action to foreclose a mortgage commenced in 1933, nine years after its dissolution.

In the case at bar the statute providing for reinstatement was in existence at all times during the corporate life of the defendant. Since it had such qualified existence even after dissolution, it could properly be sued. The amendment of the Delaware Law permitting the continuation of suits until final termination, being remedial in character, applies to the corporate appellant.

Watts v. *Liberty Royalties Corp.*, 106 F. 2d 941, 943-4;

N. L. R. B. v. *Weirton Steel Co.*, 135 F. 2d 494;

Wax v. *Riverview Cemetery, supra.*

In any event it must be remembered that in the case at bar the corporate defendant specifically seeks affirmative relief

by praying an accounting (R. 216) under which if its position is correct, it would be entitled to recover some $52,000 with interest (R. 384). Under the Delaware Law, as it existed at all times here involved, actions commenced within three years of dissolution *by the corporate defendant* continued until final judgment or decree and execution, notwithstanding the expiration of the three-year period (Dela. Revised Laws 1935, Sec. 2074). Even under the unamended Delaware Law, therefore, the action considered as one in which the corporate defendant seeks affirmative relief, has not been abated and the corporate existence has been preserved by the express provision of the Delaware Law (Opinion, Bright, *D.J.*, R. 298-303).

The designation of the Secretary of State to receive service of papers, upon surrendering authority to do business under Section 216 of the General Corporation Law, constitutes an irrevocable contract which cannot be discharged by the dissolution of the corporation in the State of its origin and renders it subject to suit in the State of New York so long as any outstanding obligation exists for a liability incurred within the State prior to the surrender of authority.

Nierbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 174-5;

Clark v. *Williard*, 292 U. S. 112, 119-120;

Dehne v. *Hillman Investment Co.*, 110 F. 2d 456 (C. C. A. 3);

State v. *Superior Court of Spokane County*, ~~15 Pac. (2d) 660;~~ 289 U.S. 361.

Dupont Co. v. *Harvey Co.*, 156 Va. 582, 591-2.

See also:

Bagdon v. *Phila & Reading C. & I. Co.*, 217 N. Y. 432, 436-7;
Ramsey v. *Rosenthal*, 242 App. Div. 526;
Druckerman v. *Harbord*, 174 Misc. 1077.

Without reviewing all of the foregoing cases, we call the Court's specific attention to *Dehne* v. *Hillman Investment Co., supra*, where the precise question involved was raised in respect of a dissolved Delaware Corporation which had previously qualified to do business in Pennsylvania and had withdrawn therefrom. Pennsylvania had a statute continuing the liability of a foreign corporation for intrastate acts substantially similar to Section 216 of the General Corporation Law. The Third Circuit Court of Appeals held that notwithstanding the dissolution and the expiration of the three-year period, the corporation continued alive in Pennsylvania in respect of acts committed within the State.

C.

The question of defendants' dissolution is substantially one of lack of jurisdiction of the person of the corporate defendant (*Nierbo* v. *Bethlehem Shipbuilding Corp. supra*, 174-5; *Dehne* v. *Hillman Investment Co. supra*, 458; *Partan* v. *Niemi*, 288 Mass. 11). The Rules of Civil Procedure require that a defense as to the legal existence of any party or capacity of any party to sue or be sued shall be raised by specific negative averment (Rule 9 (a)). This was not done. On the contrary, the existence and life of the corporate defendant was specifically admitted (R. 194,211).

Rule 12(e) of the Rules of Civil Procedure requires that every defense of lack of jurisdiction over the person must

be raised and subdivision (h) of the same rule provides that any such defense not raised by motion or answer is waived. Concededly no such defense was raised by motion or answer. Even after the expiration of the three-year period, the corporate defendant continued to litigate the case on the merits and made no motion at the trial in respect thereto, either by way of amendment of the pleadings, for abatement or to dismiss. The only motions to dismiss were on the merits, upon the ground that plaintiff allegedly had failed to establish a *prima facie* case (R. 234) or the causes of action pleaded (R. 274). The corporate defendant accordingly has waived any possible defense based upon its alleged dissolution.

Carter v. *Powell* (C. C. A. 5), 104 F. 2d 428, 430-431, cert. den. 308 U. S. 611;
Lyman v. *Knickerbocker Theater Co.*, 5 F. 2d 538.

D.

In *Oklahoma Natural Gas Company* v. *Oklahoma*, 273 U. S. 257, it was held merely that the dissolved corporation was still in being for litigating purposes and continued to be a party before this Court (p. 259).

The decision in *Matter of National Surety Company*, 283 N. Y. 68, was limited in its effect and application to *insurance companies* under the New York law, General Corporation Law Section 29, and is otherwise not applicable to the problem here. In its opinion the court recognizes the continuance of the corporate existence after dissolution for the purpose of collecting and distributing corporate assets and with authority to sue and be sued in the corporate name.

In *National Surety Company of New York* v. *Cobb,* 66 F. 2d 323, all that was decided was that the provision of the New York General Corporation Law authorizing suits against directors of a dissolved corporation as trustees in the corporate name, is inapplicable to *insurance corporations.*

It has been expressly decided by the Court of Appeals of the State of New York that a person designated under the New York statute, General Corporation Law Section 16, is a true agent. The consent that he shall represent the corporation is a real consent.

Bagdon v. *Phil & Reading C. & I. Co.,* 217 N. Y. 432, *supra.*

E.

"By asking affirmative relief the corporation became an actor in the litigation, and we think the action may be considered as one brought *by* it, within the meaning of section 2074 above quoted." (See *Merchants H. & L. Co.* v. *James B. Clow & Sons,* 204 U. S. 286.)

Opinion of Circuit Court below, R. 440.

CONCLUSION.

Certiorari will not be granted except where there are special and important reasons therefor (Rule 38 (5) Rules of the Supreme Court) nor will the writ be granted to review evidence or inferences therefrom.

General Talking Pictures Inc. v. *Western Electric Company,* 304 U. S. 175;

Southern Power Co. v. *North Carolina Pub. Serv. Co.,* 263 U. S. 508;
United States v. *Johnston,* 268 U. S. 220.

The case was tried in the District Court by petitioners upon the assumption that the "dead man's statute" was applicable and controlling but that the door to admission of the testimony had been opened. Petitioners' present counsel stated at the trial (R. 251):

> "Of course we all know we could not come in here and open the door ourselves. That is not the question. *We know that we could not offer this testimony unless the door had been opened,* and we could not offer the testimony, I am willing to grant, if this document were complete on its face and the plaintiff were not seeking to draw inferences of modifications of it in order to try to sustain it. Now, I say that we have a right to rebut those inferences by showing what disposition was made of this document."

Similar argument based in part upon *Dellefield* v. *Blockdell, supra,* was made to the Circuit Court (R. 438).

The petition for rehearing proceeded similarly (R. 450, 451) and *the suggestion that Rule 43(a) was misapplied or misinterpreted is made for the first time upon this petition for certiorari.* This court has repeatedly held on similar facts that it will not consider a point newly raised and not argued before or reviewed by the courts below.

Husty v. *United States,* 282 U. S. 694, 701, 702;

Adams v. *Mills,* 286 U. S. 397, 416;
Burnet v. *Commonwealth Improvement Co.,* 287 U. S. 415, 418;
Benjamin v. *United States,* 274 U. S. 195, 200;
Blair v. *Oesterlein Co.,* 275 U. S. 220, 225.

In *R. M. Robinson & Co.* v. *Belt,* 187 U. S. 41, 50, the court said,

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo.*"

The application should be denied.

Respectfully submitted,

EDGAR J. BERNHEIMER
HARRY T. ZUCKER
Respondent's Counsel.

APPENDIX A

Revised Code of Delaware, 1935, Chap. 65.

"2074. Sec. 42. *Continuation of Corporation after Dissolution for Purposes of Suit, Etc.*—All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by *or against* the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three year period and until any judgments, orders, or decrees therein shall be fully executed." (Words in italics added by Laws of Delaware, 1941, Chap. 132, Section 11, effective April 9, 1941.)

APPENDIX B

New York General Corporation Law, Section 216.

"Surrender of authority.

"1. A foreign corporation, other than a moneyed corporation, having authority to do business in this state, may surrender such authority by filing in the department of state a certificate in its corporate name, signed and acknowledged by its president, a vice-president, or its secretary, treasurer, managing director or attorney in fact, stating:

* * * *

"e. That it consents that process against it in an action or proceeding upon any liability or obligation incurred within this state before the filing of the certificate of surrender of authority, after the filing thereof, may be served upon the secretary of state.

* * * *

"2. * * * The filing of such certificate shall not, however, affect any action pending at the time of such surrender, or affect any right of action upon any contract made by the corporation in the state before the filing of the certificate of surrender of authority. Process against the corporation in an action upon any liability or obligation incurred within this state before the filing of such certificate of surrender of authority may be served, after the filing thereof, upon the secretary of state."

FILED
NOV 10 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 580

BAUER, POGUE & CO., INC. and FREDERICK R. BAUER,

Petitioners,

—against—

ADELE D. TROUNSTINE, as Ancillary Executrix of the Last Will and Testament of NORMAN S. GOLDBERGER, Deceased,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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